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2004

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### Recommended Citation

Dworkin, Roger B., "Bioethics? The Law and Biomedical Advance" (2004). *Articles by Maurer Faculty*. Paper 767.  
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# BIOETHICS? THE LAW AND BIOMEDICAL ADVANCE

Roger B. Dworkin<sup>†</sup>

MY FIRST EXPOSURE to what has come to be called “bioethics” came from reading a remarkably prescient symposium in the UCLA Law Review in 1968.<sup>1</sup> Beginning with a Foreword by Linus Pauling<sup>2</sup> and a startling look at things to come by a UCLA psychiatrist,<sup>3</sup> the symposium considered topics as diverse as organ transplantation<sup>4</sup> and the rule against perpetuities.<sup>5</sup> It contained an article about bioengineering<sup>6</sup> as well as more fanciful articles.<sup>7</sup> Importantly, the

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<sup>1</sup> Symposium, *Reflections on the New Biology*, 15 UCLA L. REV. 267 (1967-1968).

<sup>2</sup> Linus Pauling, *Foreword: Reflections on the New Biology*, 15 UCLA L. REV. 267 (1967-1968) (discussing the legal impact of the discovery of the specific molecular structure of substances).

<sup>3</sup> Roderic Gorney, *The New Biology and the Future of Man*, 15 UCLA L. REV. 273 (1967-1968) (noting that advances considered in the symposium articles constitute a new phase in human life in which man will take deliberate control over his own evolution, thereby necessitating a reworking of values for appropriate guidance).

<sup>4</sup> David Sanders & Jesse Dukeminier, Jr., *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation*, 15 UCLA L. REV. 357 (1967-1968) (arguing that current law prevents the medical community from fully utilizing cadaveric organs to save lives).

<sup>5</sup> Daniel M. Schuyler, *The New Biology and the Rule Against Perpetuities*, 15 UCLA L. REV. 420 (1967-1968) (urging that like “exotic” laws, venerable laws such as the Rule against Perpetuities need to be reformed to adapt to the possibilities of new biology).

<sup>6</sup> Martin P. Golding, *Ethical Issues in Biological Engineering*, 15 UCLA L. REV. 443 (1967-1968) (favoring an approach in which geneticists control genetic engineering while adhering to publicity requirements and following the “first do no harm” principle).

<sup>7</sup> See, e.g., John Batt, *They Shoot Horses, Don't They?: An Essay on the Scotoma of One-Eyed Kings*, 15 UCLA L. REV. 510 (1967-1968) (using prose to caution society to fully consider the implications of biological advances before embracing such changes); see also Curtis Henderson & Robert C.W. Ettinger, *Cryonic Suspension and the Law*, 15 UCLA L. REV. 414 (1967-1968) (discussing legal complications concerning the definition of “life” that may arise from the cryogenic preservation of human bodies).

symposium also included two articles about the legal process – legal institutions and their ability to respond to biomedical developments.<sup>8</sup>

Striking as it was in its farsightedness, the UCLA symposium in some ways anticipated not only the substance of “bioethics,” but also the nature of the literature. For the most part the scholarly literature produced by legal academics has dealt with substantive issues. Much of it has proceeded from clear value premises about what the “right” answer to some bio-social conundrum ought to be and has argued for Supreme Court decisions to support the author’s preferences, or legislation to enshrine it. The “ethical” analysis to support the substantive preference is often more assertion than analysis, and it often unquestioningly adopts some value (most often “autonomy”) and argues that the value supports its conclusion. Only occasionally do we see serious attempts to explore the ability of legal institutions to cope with rapid change in biology and medicine.

This seems a shame, but it is hardly surprising. Bio-social issues are exciting; they stir the passions. Who cannot get exercised about maternal choice versus fetal life, the respective “rights” of genetic and gestational mothers, whether suffering persons ought to be allowed to receive assistance in ending their lives, and whether we should create entire genetic twins of existing human beings? Yet lawyers have nothing special to say about any of these matters. If hired, a lawyer can advocate a position for a client. An academic lawyer can develop arguments in articles and hope that practicing lawyers will find them useful and that courts will adopt them. But there is nothing about legal training that makes a lawyer’s opinion about these issues any better than anybody else’s.

The discipline that seems best equipped to evaluate bio-social questions is philosophy. That is why the field is called bioethics. Ethics is a branch of philosophy with a rich history, millennia of literature, and deep, fundamental disputes. It is hard to do well. Lawyers are not trained to do it.

Typical American law school curricula contain no courses on philosophical ethics. They usually offer an elective course on jurisprudence and maybe a specialized course on some type of jurisprudence (feminist jurisprudence, for example). They also offer a course on

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<sup>8</sup> Warren E. Burger, *Reflections on Law and Experimental Medicine*, 15 UCLA L. REV. 436 (1967-1968) (reflecting that the law should continue to develop techniques to meet new biological problems by adapting solid basic precedents to keep science within the bounds of societal acceptance). See also Frank P. Grad, *Legislative Responses to the New Biology: Limits and Possibilities*, 15 UCLA L. REV. 480 (1967-1968) (asking generally whether or not technology and knowledge have advanced sufficiently for an appropriate legislative response).

“legal ethics,” which is usually as far removed from philosophy and surely as far away from biomedical developments as anything can be. If a lawyer has any sophistication in ethics, he or she gained it outside the legal academy.

Bioethics, like all ethics, needs to be done by philosophers, persons who know how to do it. To the extent that lawyers claim to do bioethics they perform a disservice by claiming for themselves an expertise they lack and claiming for their work a value it does not possess. Like everybody else, academic as well as practicing lawyers are free to hold and to espouse any positions they want. That does not mean, however, that their positions are “bioethics” or reflect their expertise.<sup>9</sup>

On the other hand, there are contributions that legally trained persons can make to the pressing effort to deal with the social questions posed by biomedical advance. Lawyers know one thing that nobody else knows. They know how the *system* works. Lawyers are experts at understanding legal institutions and how to use them. Bringing that knowledge to bear on bio-social issues can make a real contribution.

From the beginning, a small amount of legal commentary about bio-social issues has focused on issues of process. In the UCLA symposium, future Chief Justice Burger made an astounding claim:

It should be understood that it is not the role and function of the law to keep fully in pace with science. Yet the law has demonstrated its capacity over the years to develop techniques to meet new problems . . . .

. . . .

Since law is no stranger to new problems, I venture to suggest that it will find solid basic precedents that can be adapted, within limits, to the problems of organ transplants, genetic modifications, and other problems. Some of this will be by codes and acts of legislatures, but most of it will emerge slowly and cautiously in the courts by the application of old principles and techniques of the common law. There can be

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<sup>9</sup> Years ago our faculty was interviewing a candidate for an entry level faculty appointment. He was invited to dinner at a colleague’s house. Among the other guests was a professor of philosophy. During dinner the candidate asked the philosophy professor what he did. The professor replied, “I’m a philosopher.” “Yeah, yeah,” the candidate said. “We’re all philosophers. I mean what do you do for a living?” We are not all philosophers. Some people—most of whom do it for a living—really are; they deserve the same respect that lawyers, physicians, physicists, and other professionals deserve for theirs.

no other way. The law does not make *discoveries* as medicine and science do; it evolves slowly. It responds rather than anticipates.<sup>10</sup>

"There can be no other way." Since first reading that sentence I have oscillated between condemning it as an example of arrogance and intellectual bankruptcy and thinking that, while overstated, it contains a fairly large grain of truth. Legislation is usually too clumsy and political to deal well with issues posed by fast-paced biomedical advance. The common law is, therefore, the preferred response unless and until it has been demonstrated to be incapable of dealing with a set of problems. Yet the common law cannot always work. To use one of Chief Justice Burger's own examples, the common law has proved woefully inadequate to deal with issues of how to obtain enough organs for transplantation and how to allocate the organs we have. Moreover, the suggestion that there can be no other way, which could be taken as arrogance, could also be read as an admission of defeat, as giving up.

Perhaps there is utility in seeing whether there can be another way, in testing legal institutions and in trying to develop new ones to solve the problems with those that already exist. Having made the effort, we may decide that there can be no other way (and that will teach us a great deal about the limits of law), but to assert the defeatist position without testing it seems sad indeed.

My own work has primarily been directed toward this legal process approach. In this essay, however, I want to discuss using the social issues posed by biomedical advance as a device for teaching law students about the legal process.

Law school curricula are made up of several kinds of courses.<sup>11</sup> By far the most numerous are doctrinal courses in which students are exposed to bodies of substantive law that are thought to cohere – Torts, Contracts, Property, Wills and Trusts, etc. A second large group of courses is organized primarily around different types of procedure and procedural problems – Civil Procedure, Criminal Procedure, Evidence, etc. Third, a few courses proceed from the recognition that real persons do not have legal doctrines. They have businesses they need to run, accidents to cope with, etc. all within the con-

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<sup>10</sup> Burger, *supra* note 8, at 438-39.

<sup>11</sup> For purposes of this essay I shall discuss only non-clinical courses. This is not meant to denigrate the importance of clinical education, but simply to recognize that the clinical/non-clinical debate raises issues far beyond the scope of what we are discussing here.

text of some set of activities or some social condition. These courses use the activity or condition as the organizational fulcrum and examine large bodies of law from multiple doctrinal areas to see how the law impinges on the activity or condition and how the activity or condition affects the doctrine. Such courses, which I call, "functional courses," include, for example, Law and Medicine, Law and Education, Sports Law, Women and the Law, Race and the Law, etc. Some courses combine foci. For example, Constitutional Law is a course about an area of substantive law (a doctrinal course) made by one legal institution with its own peculiar procedures (a procedural course). And, of course, all courses involve some elements of doctrine, procedure, and function.<sup>12</sup> The rough categories suggested here mean to suggest that different courses have different emphases, not that they have nothing in common.

What is missing in all of this is courses that provide an overview, that allow the students to step back from the particular and to see the legal system as a whole. Such an overview is important, not only to enrich students' theoretical understanding, but to improve their skills as practicing lawyers. A lawyer who knows what the system can and cannot do, who knows which parts of the system can do what, and who knows how to ask for something to maximize the chances of getting it done is likely to be much more effective than a lawyer who cannot break free from the chains of Contracts or Torts.

At the substantive level, the functional courses serve some of this overview function. One hopes that a student who has studied Law and Medicine will understand that context matters and that cases involving accidents arising out of automobile wrecks, baseball games, gunshots, and drownings will differ from each other even though they are all "Torts" cases in which liability is based in negligence, just as medical malpractice cases differ from other negligence cases.

But far more important than a substantive overview is a procedural overview. If procedure is the one thing lawyers can claim to understand and use better than anybody else, if it is what separates us from laypersons, then we must in fact understand how the entire system works, how each of its parts works, how the parts relate to the whole, and what are the benefits and shortcomings of each part of the system and of the system as a whole.

This is hardly a new insight. Hart and Saks had it fifty years ago.<sup>13</sup> For a brief period of time teaching Legal Process using Hart

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<sup>12</sup> For example, I often claim that my Torts course is a running commercial for Civil Procedure, and the one mantra my Torts students learn is not, "Shift the loss," or "Place the blame," but "Procedure is everything."

<sup>13</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC*

and Saks was common in American law schools, and “Legal Process” became a legal sub-discipline, much like Law and Economics or Law and Society is today. However, the legal process movement has fallen on hard times. Not too many people teach it any more. Why is that?

I think it is because the subject, taken by itself, is too abstract for both teachers and students. Thinking and teaching about the legal system abstracted from substance is both impossibly difficult and of questionable utility. Studying it is horribly boring and invites the reaction that the subject is worthless.

In large measure the problem stems from the original Hart and Saks teaching materials. One of the great intellectual achievements in the history of legal scholarship, the materials are eminently unteachable. They were organized around a series of problems that bore no apparent relation to each other and that required the student to continually learn new areas of substantive law and arcane facts in order to get the process point. The problems were not even interesting. They may have been intellectually interesting, but they had too little human interest to grab students’ attention. The first, 59-page problem dealt with cantaloupes that rotted at a railroad siding and included pages of description of a disease of cantaloupes called “cladosporium rot.”<sup>14</sup> Nobody except cantaloupe farmers and shippers could be interested in that.

In order to be taught in a way that students will care about and learn from, legal process lessons have to be placed into a substantive context. It should be *a* (one) substantive context, so that the students do not have to be constantly diverted by learning new things that are largely unrelated to the point of the exercise.<sup>15</sup> It should be an inherently interesting substantive context so that the students do not mind reading about it. Process points are inherently difficult and abstract. There is no harm in using a spoonful of sugar to make the medicine go down. Of course the substantive focus must be broad and complex

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PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958).

<sup>14</sup> See *id.* at 10-68 (using a dispute over spoiled cantaloupes to illustrate the significance of legal institutional systems and processes).

<sup>15</sup> One context does not mean one body of doctrine. See, e.g., MARC A. FRANKLIN, *THE DYNAMICS OF AMERICAN LAW: COURTS, THE LEGAL PROCESS AND FREEDOM OF EXPRESSION* (1968). Franklin, who has taught Legal Process in law school, prepared an undergraduate legal process teaching book that focused on issues in communications including defamation issues, other free speech issues of constitutional dimension, and legislative and administrative regulation of the communications industry. There were many doctrinal foci, but the way the legal system deals with communication was the substantive link that tied the process points together.

enough that it permits exploring a fairly full range of legal process lessons.

Biomedical advance is an almost perfect substantive context for teaching legal process. The issues posed are inherently interesting and highly controversial. They permit the students to see the processes of law attempt to come to grips with legal problems at various stages of the problems' development. They raise issues that have been dealt with by each of the system's processes. They are big and complex enough to fill a course, but closely enough related to make treatment in one three-semester-hour course feasible. Finally, they teach lessons that are relevant far beyond the field of law and biomedical advance.

Almost everything in the field flows from *Roe v. Wade*.<sup>16</sup> Therefore, one can begin the course by exploring the wisdom of using the law's most extreme tools to deal with a problem. Abortion law is the story of attempting to use one legal weapon of mass destruction (constitutional adjudication) to try to undo the devastation wrought by its other WMD (the criminal law). Unlike a substantive discussion of abortion, focusing on the processes of constitutional adjudication and criminal law allows the students to consider the issues calmly and to permit meaningful discussion in class. Anti-abortion partisans may begin to see that criminalizing everything that one disapproves of may not be a very good idea. Pro-choice advocates may begin to wonder whether their movement would be better off today if it had allowed legislative reform to run its course, rather than insisting on a constitutional victory. The limits of the criminal law, when to use and when not to use it and the limits of constitutional law, and when to use and not to use it can all be explored. The characteristics of the abortion problem can be placed side by side with the characteristics of constitutional adjudication to see why a constitutional approach may not have been the best one from the point of view of those who sought it. This presents a methodology for considering whether to use constitutional adjudication to deal with other issues and suggests to students who are interested in careers in legal reform that going for ultimate victory may lead to a Pyrrhic one. If a lawyer can counsel a client out of an extreme, superficially attractive approach and into a moderate, less glitzy one that will actually provide more relief, then that lawyer has done the highest kind of professional service and really has used the knowledge that makes lawyers special, knowledge about the legal system, in the service of a client.

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<sup>16</sup> 410 U.S. 113 (1973).



One can test all of this and drive the lessons home by comparing the efforts to deal constitutionally with sterilization with the much more sensible efforts stemming from the Supreme Court of Washington's moderate approach in *Guardianship of Hayes*.<sup>17</sup> One can teach the magnificently instructive case, *Conservatorship of Valerie N.*,<sup>18</sup> in which the competing claims were that a developmentally disabled person has a constitutional right to be sterilized and a constitutional right not to be sterilized, to demonstrate the folly of elevating every issue to a constitutional level. Sterilization is also a useful topic for discussion because, as the competing positions in *Valerie N.* indicate, sterilization is perceived as a bad thing to those who are getting it and a good thing to those who are denied it.<sup>19</sup> This foreshadows the death and dying discussion where the same paradox exists and is a phenomenon that is common in the law.<sup>20</sup>

Discussion of abortion and sterilization, which offers a wonderful look at the relative virtues of thinking big and thinking small, can profitably be followed by considering issues of assisted reproduction. Here the common law (the paradigmatic legal example of thinking small) has proved remarkably successful from everybody's point of view—mothers, husbands, children, donors and donors' wives, doctors and male doctors' wives, and the state—in dealing with issues of artificial insemination by donor (AID) of married women whose husbands have consented to the procedure. It also has been relatively successful in dealing with artificial insemination issues that arise when the technique is used in less conventional settings, for example as a device to permit lesbians to have children. Legislation, both real and model, has made a hash of these issues despite trying to serve the same policies as the courts. The question that all of this poses is whether the same experience can be expected with other techniques of assisted reproduction, like surrogate motherhood and in vitro fertiliza-

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<sup>17</sup> 608 P.2d 635 (Wash. 1980) (creating judicial standards for sterilization of a mentally incompetent minor, including among other things: appointing a guardian *ad litem*, examining medical evidence of incapacity, and proving that sterilization would be in the child's best interest).

<sup>18</sup> 707 P.2d 760 (Cal. 1985) (holding that California statute prohibiting sterilization of person under conservatorship impermissibly deprives developmentally disabled persons of privacy and liberty interest protected by the State and Federal Constitutions).

<sup>19</sup> *Id.* at 771 (noting that appellant's argument that the statute deprives Valerie of her right of procreative choice conflicts with appellee's argument that statute furthers that right by protecting her from sterilization).

<sup>20</sup> Another example is the area of human experimentation where women and members of minority groups argue simultaneously that they are discriminated against by being used and by not being used as human subjects.

tion. If not, what is the difference between the situations that makes common law work better in one setting than the other? Can one take generalizable lessons away from the comparison?

Common law courts have been reluctant to label the offspring of AID of married women whose husbands consented to the procedure as “legitimate,”<sup>21</sup> but in every case that has arisen, they have reached the same result that would have been reached in a case involving the clearly legitimate child of a married couple.<sup>22</sup> This gives children two sources of financial and emotional support and a “father figure” in their lives. It gives husbands both the benefits and detriments of parenthood, which is appropriate, given their conscious role in the process. It gives wives a source of support for their child and treats them the same as any other wife and mother would be treated in a divorce case. It imposes no parental obligations on doctors, donors, or their wives. And it maximizes the state’s chance to avoid having to support the child by obligating both the husband and the wife, rather than just the wife, to do so. Yet, by refusing to attach a label to the child or to make a definitive ruling about the husband’s or donor’s status, the courts have left themselves free to reach different results in cases whose facts are different and seem to call for different outcomes.<sup>23</sup>

Both real legislatures and the Commissioners on Uniform State Laws have attempted to achieve the same results for individuals and the states while providing a measure of certainty that common law development does not provide. As I have noted elsewhere,<sup>24</sup> the results have been confusing at best, counterproductive at worst. Statutes have turned women who inseminate themselves into felons;<sup>25</sup> made the husband-child relationship either turn on whether sperm from a third party was donated (given for free) or required courts to avoid that construction and decide cases as a matter of common law;<sup>26</sup> and

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<sup>21</sup> ROGER B. DWORKIN, *LIMITS: THE ROLE OF THE LAW IN BIOETHICAL DECISION MAKING* 64 (1996) [hereinafter *LIMITS*].

<sup>22</sup> *Id.*

<sup>23</sup> *See id.* at 64-65 (using—in the absence of laws legitimizing children born from AID via their mothers’ husbands—the hypothetical of forcing Nobel Laureate sperm donors to support children conceived with their sperm as a way for the Court to discourage positive eugenics).

<sup>24</sup> *See id.* at 65-69 (noting, for example, that Georgia’s statutes are unclear as to what type of written consent will relieve a doctor from liability and whether this is a complete or partial bar to liability).

<sup>25</sup> Compare GA. CODE ANN. § 43-34-42 (2002) (making it a felony for any non-physician, non-surgeon to perform artificial insemination), with *McIntyre v. Crouch*, 780 P.2d 239, 243 (Or. Ct. App. 1989) (explaining that a woman who inseminates herself is only guilty of a misdemeanor). See generally *LIMITS*, *supra* note 21, at 66, for a discussion of this phenomenon.

<sup>26</sup> *See, e.g.*, UNIF. PARENTAGE ACT § 5, 9B U.L.A. 407 (1973) (stating that if

spoken in such convoluted language that they have raised serious questions about whether they apply only to cases involving the husband's rights and obligations or also the child's.<sup>27</sup>

Similarly, in cases involving artificial insemination of unmarried and lesbian women, courts have adopted pragmatic, practical approaches that seem to make sense for the parties, while legislatures have adopted hard and fast rules that often lead to senseless results. For example, in cases involving known donors and lesbian mothers, courts have made questions of the donor's rights to custody and visitation depend upon facts such as the amount of involvement the donor has had in the life of the child; the nature of their relationship; whether the donor is paying child support; and the mother's behavior.<sup>28</sup> They have been reluctant to treat mothers' lesbian partners as "parents," but they have protected their interests by assuring that they have visitation rights, that the child is accessible to them, etc.<sup>29</sup> In a messy and unpleasant situation, that is about the best one can do. The Uniform Status of Children of Assisted Conception Act, on the other hand, would simply eliminate any parental claims of the donor regardless of the facts of the particular case.<sup>30</sup> That represents the triumph of ideology and the quest for certainty over good sense. Moreover, the ideology is not clear, as the drafters state that their goal is to promote the best interests of children,<sup>31</sup> but in many cases cutting one parent out of a child's life is not best for that child.

Why has the common law worked so much better than legislation in dealing with legal issues raised by artificial insemination? I would

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husband consents to wife's artificial insemination by non-husband *donor* semen, then husband is treated in law as if he were the natural father); *see also* R.S. v. R.S., 670 P.2d 923 (Kan. Ct. App. 1983) (holding that father who consents to heterosexual insemination of wife is treated legally as the natural father of the child and must uphold his responsibilities as such).

<sup>27</sup> *See, e.g.*, LIMITS, *supra* note 21, at 67 (noting that even the model statutes have language that creates inconsistent results when practically applied to a case).

<sup>28</sup> *See, e.g.*, Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 536 (Cal. Ct. App. 1986) (holding that the court's ruling did not infringe upon any right of two women to family autonomy, because semen donor was never excluded as a member of the family by anonymity, by agreement, or by the parties' conduct).

<sup>29</sup> *See, e.g., id.* at 537 (refusing to determine whether lesbian partner was a de facto parent, court recognized previously granted visitation rights); *see also In re LaChapelle v. Mitten*, 607 N.W.2d 151, 161 (Minn. Ct. App. 2000) (holding that standing as a parent is irrelevant to custody statute and noting that the best interests of the child is always the overriding consideration in custody decisions, therefore, lesbian partner could seek joint custody).

<sup>30</sup> UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4 (withdrawn 2000), 9C U.L.A. 363, 371 (Supp. 2003).

<sup>31</sup> *Id.* at 364-65.

suggest that the explanation lies in the fact that conduct control is not an important priority in this setting; that no social problem of magnitude is involved; that nothing that would disable judges from handling the problems exists; that sensible results are highly fact dependent; and that the issues are analogous to those with which the courts have been dealing for centuries. That is, I am not aware of anybody who thinks that artificial insemination should be prevented or strictly controlled, something courts could not do well. Artificial insemination poses no major crisis for the nation to which the law must respond. No scientific or other expertise that judges lack is needed to resolve the cases. Sound results in human relationship cases depend on the infinitely variable facts of human relationships. And issues of custody, child support, visitation, etc. are the kinds of issues courts have long known how to resolve.

The legislatures, on the other hand, have sought to impose one-size-fits-all, certain solutions on areas where certainty is not only unnecessary, but undesirable; and they have responded to imaginary problems (like the nonexistent health problems of women inseminating themselves) by ignoring the first rule of sound law making: if it ain't broke, don't fix it.

Would one expect the same results when one considers other forms of assisted reproduction, such as surrogate motherhood and in vitro fertilization? That depends on whether one thinks that conduct control is important in those areas. If it is, the common law will not work. If it is not, then the common law can be expected to do well with fact-centered, human relations issues of the type that courts have long dealt with and that require no scientific expertise for their resolution.

Some persons think that conduct control is important in the area of surrogate motherhood in order to avoid the evils of baby selling, economic and psychological exploitation of women, demeaning women by treating them as things, and the placement of children without regard to their interests. Others disagree, thinking that the evils of baby selling do not exist in the surrogacy context, that economic and psychological concerns are overstated and would only apply in some cases anyway, that refusing to allow women to serve as surrogates, rather than using them, would demean women by denying their ability to make rational choices, and that surrogacy is no different than artificial insemination in terms of not considering the interests of children. If one holds the first set of views, then legislation is necessary to avoid the evils one fears. If one agrees with the second set of positions, then the common law will work fine. Here substantive views determine sound institutional choices.

However, even if one is committed to the need for legislation, one should make sure that the legislation serves the needs that gave rise to it. Once again, the Uniform Status of Children of Assisted Conception Act disappoints. Rather than offer a uniform statute, the Commissioners provided two choices, one outlawing surrogacy and one regulating it.<sup>32</sup> That makes no sense. Either surrogacy should be banned for the reasons suggested above, or the problems with it are too trivial to require regulation. If the latter is the case, then all the Uniform Act does is create pitfalls and possibilities of unimportant errors that will upset people's plans. No justification for doing that exists.

The state courts have dealt with surrogate motherhood as one would expect—demonstrating their ineptitude in dealing with conduct control while sorting out human relationships reasonably well. The leading example is the famous New Jersey case, *Matter of Baby M*.<sup>33</sup> The New Jersey Supreme Court was appalled by surrogate motherhood, or at least by surrogate motherhood for a fee, for the typical reasons mentioned above. Therefore, it sought to prevent the practice. Lacking the legislature's authority to simply prohibit the practice, the court tried to achieve its goal by declaring surrogacy contracts void.<sup>34</sup> That was a serious mistake as it made the contracts of no effect. That means that the surrogate cannot enforce the contract against an unwilling intended father who refuses to pay the surrogate's fee or medical expenses, or to accept the child. For a court that was largely concerned with protecting surrogates and potential surrogates, that is a singularly perverse result.<sup>35</sup>

There are two important lessons for the students here. First courts do not do well when they try to do what a legislature is made to do — make people act in a certain way. Second, even if the court could not achieve its conduct control goal, it could have done a better job of achieving its policy goal by thinking small. If the court had declared the contract voidable at the instance of the surrogate, rather than void, surrogates would be protected both by being allowed to avoid contractual obligations that the court thought were inappropriate and by being

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<sup>32</sup> Compare *id.* § 5 at 383 (declaring surrogacy agreements void as “Alternative B”), with *id.* §§ 5-9 at 373-382 (describing a framework for lawful surrogacy agreements as “Alternative A”).

<sup>33</sup> 537 A.2d 1227 (N.J. 1988).

<sup>34</sup> *Id.* at 1234 (holding a surrogacy contract invalid as a violation of public policy).

<sup>35</sup> LIMITS, *supra* note 21, at 75.

able to receive contractual benefits if they chose to do so. Thinking small almost always works better than thinking big.

In the human relationships area, on the other hand, the court did fine. It applied the legislative standard to refuse to terminate the surrogate mother's parental rights; it did a best interests of the child analysis to determine custody; and it recognized and protected the non-custodial parent's interest in visitation. This treated the child as well as children in disputed parentage/custody disputes are ordinarily treated, recognized the competing needs of the adults involved, and reached the kind of compromise that will not make any of the adults totally happy. This made surrogacy not terribly attractive to anybody, which fostered the court's own anti-surrogacy views and probably did the best thing for a society in the early stages of debate about a new biomedical possibility—slowing the technique down so that it will not do too much harm, while allowing it to proceed so that the society will not lose too much good.

The same lessons can be pursued and driven home by discussing the surrogacy cases in which there is a question about who is a mother and the in vitro fertilization cases. One can also add new lessons as one goes. For example, one can use *Johnson v. Calvert*<sup>36</sup> to teach that a court can guarantee an outcome by adopting one substantive test or leave future courts free to reach the right result on particular facts by adopting a different one. In *Johnson*, where one woman provided an ovum, and a different woman carried the pregnancy to term, the majority applied an "intending mother" test to hold that the ovum provider was the mother of the resulting child.<sup>37</sup> The dissent applied a best interest of the child test.<sup>38</sup> As the dissent correctly pointed out,<sup>39</sup> the ovum provider will win every case under an "intending mother" test. Therefore, the result of adopting that test is to treat the claims of the gestational mother as of no value. Under a "best interests of the child" test, on the other hand, one cannot predict in advance how a case will come out, and the genetic mother and the gestational mother each has an opportunity to be treated as a legal mother. Learning that one can control outcomes by adopting apparently abstract tests is an important and generalizable lesson.

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<sup>36</sup> 851 P.2d 776, 783 (Cal. 1993) (holding that in deciding the question of motherhood, the parties' intentions at the time they enter a surrogacy contract should control), *cert. denied*, 510 U.S. 874 (1993), and *cert. dismissed sub nom.* Baby Boy J. v. Johnson, 510 U.S. 938 (1993).

<sup>37</sup> *Id.* at 782.

<sup>38</sup> *Id.* at 799-801 (Kennard, J., dissenting).

<sup>39</sup> *Id.* at 797.

The material on assisted reproduction leads naturally to a consideration of genetics. Here discussion can begin with the wrongful birth and wrongful life cases<sup>40</sup> to illustrate again the ability of the common law to respond to new challenges when conduct control is not important, scientific knowledge is not essential to reaching sound results, and there is a rich background of common law doctrine within which to locate the new cases.

This does not mean that the courts get every case right. There are not very many areas in which they do that. It means only that their errors are simply mistakes rather than the inevitable errors that would flow from using the wrong institutional response.

For example, in *Howard v. Lecher*<sup>41</sup> the New York Court of Appeals denied emotional distress damages to the mother of a child born with Tay Sachs disease.<sup>42</sup> The court held that the only injury was to the child and that the allegedly negligent obstetrician owed no duty to the mother because she was a mere bystander at the birth of her child.<sup>43</sup> This ridiculous result can be explained by focusing on courts' traditional reluctance to award emotional distress damages in cases not involving physical injury to the plaintiff and on New York's absurd "bystander" rule for dealing with such cases. Another court with a different view could easily have reached the opposite result. After all, to whom does an obstetrician owe a duty if not to his or her patient, the mother, and what is the likelihood that a mother's claims of emotional distress are fabricated in a case involving the birth of a child with a horrible, fatal genetic disease?

For the most part, however, the courts have dealt reasonably well with issues of wrongful birth and life, which fit relatively comfortably into established tort law parameters. Thus, they have recognized parents' rights to recover for the avoidable birth of a child with serious genetic birth defects,<sup>44</sup> they have wrestled uncomfortably with the question of the child's right to recover,<sup>45</sup> they have been careful to

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<sup>40</sup> While the terminology makes absolutely no difference, the convention is to call cases brought by parents of "defective" children to recover for the parents' damages, actions for "wrongful birth," and to call cases brought on behalf of the child, "wrongful life" cases.

<sup>41</sup> 366 N.E.2d 64 (N.Y. 1977).

<sup>42</sup> *Id.* at 66.

<sup>43</sup> *Id.* (explaining that no cause of action exists for emotional distress caused by a reaction to the direct injury suffered by another).

<sup>44</sup> See, e.g., *Turpin v. Sortini*, 643 P.2d 954, 957, 966 (Cal. 1982) (noting that a majority of recent cases have permitted parents to recover at least some damages in wrongful birth actions, and holding that children should also be able to recover limited damages).

<sup>45</sup> See *id.* at 957-59 for a general discussion.

avoid over compensation by refusing to award the same damages to both parents and children,<sup>46</sup> and they have begun to struggle with the question of what negligence means in the medical genetics context.<sup>47</sup> This is the way in which tort law usually evolves to meet problems caused by emerging technologies, and the differences between genetic medicine and conventional medicine<sup>48</sup> can readily be handled within the fact-sensitive approach of the common law.

After discussing the wrongful birth and life cases one can spend whatever time one thinks appropriate discussing other practical problems that confront health professionals in a genetic practice—for example, questions about what unsought information (like fetal sex or XYY status) must be disclosed and to whom the information must be disclosed (non-paternity to a husband? risk of bearing a child with a genetic disease to a sibling? potential dangerousness to an employer?) I think these are useful subjects to discuss because they illustrate how different genetic medicine is from other medicine because genetic medicine necessarily involves more than one person in addition to the health professional and usually involves discovering more information than one was looking for. This presents an opportunity to consider whether those different features of genetic medicine render analogies to traditional medical cases inapt and require a new institutional response or just new doctrinal developments from the common law courts.

Of course, modern genetics involves more than practical problems for practitioners and patients. Issues of gene therapy and genetic research, including research into cloning and stem cells, must be examined. These issues cannot simply be resolved by the common law. Sound resolution depends, in large part, on scientific understanding, understanding that experts in the field are only beginning to develop and that courts cannot have. It also requires making fundamental judgments about whether certain kinds of work are to be prohibited,

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<sup>46</sup> *Id.* at 965-66 (explaining that courts cannot permit double recovery of medical expenses).

<sup>47</sup> Compare, e.g., *Pratt v. Univ. of Minn. Affiliated Hosp. & Clinics*, 403 N.W.2d 865, 867-70 (Minn. Ct. App. 1987) (holding that genetic counseling is treatment within the doctrine of negligent nondisclosure), with *Pratt v. Univ. of Minn. Affiliated Hosp. & Clinics*, 414 N.W.2d 399 (Minn. 1987) (reversing the Court of Appeals and ruling that diagnosing a condition does not give rise to a duty to disclose risks inherent in undiagnosed conditions).

<sup>48</sup> For example, genetic medicine inevitably involves multiple persons, thereby making it hard to know to whom the doctor owes a duty; genetic medicine often affects the unborn; genetic “treatment” is still largely limited to talking to people, explaining options to them, thus raising the question of whether genetic malpractice is more similar to conventional malpractice cases or to informed consent cases.



discouraged, regulated, permitted without regulation, or encouraged—in other words, questions of conduct control.

A brief look reveals that not only the courts, but also the legislatures, lack the competence to deal with gene therapy, cloning, and stem cell research. The science is too uncertain, and both the possible benefits and the possible physical and moral risks of the techniques are too speculative to justify the kind of definitive, across-the-board answers that legislation provides. Rather, these developments invite consideration of the administrative law process and of the development of new legal institutions.

At first blush, administrative response to these technologies seems appropriate. An administrative response is supposed to combine expertise, informality, regulation (conduct control), narrow application (controlling specific conduct, not conduct across-the-board), and the possibility of positive reactions (for example funding) rather than penalties and stigmatization as a way to control behavior. On the other hand, many will find the risks of capture of the process by the experts it is supposed to control, complexity, bureaucratic wrangling, legislative interference, and judicial review sufficient to disqualify agencies from responding well to the issues. Of course, the teacher should be careful to discuss the facts of gene therapy, cloning, and stem cell research to the extent that they are known in order to see whether administrative law will work better for one or more of the developments than for the others.

Finally, if administrative agencies are not well designed to deal with some of the issues posed, then one should consider the development of new institutions. This requires first identifying exactly what the deficiencies of existing institutions for dealing with specific problems are; second, formulating the characteristics that a new institution should possess in order to overcome those deficiencies; and third, grappling with questions about who would create the new institution, what branch of government would it be in, how one can assure its legitimacy, how can one avoid the problems of excessive judicial and legislative involvement that have plagued administrative agencies, etc.<sup>49</sup> This is an explicit effort to deal with then Judge Burger's assertion that, "There can be no other way."<sup>50</sup>

Having used abortion, sterilization, assisted reproduction, genetic medicine, and genetic research to explore issues of institutional com-

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<sup>49</sup> I am trying to make a preliminary effort to deal with these questions. See Roger B. Dworkin, *Anything New Under the Sun?: Designing Legal Institutions to Deal with Biomedical Advance* (forthcoming).

<sup>50</sup> See Burger, *supra* note 8, at 439.

petence, one can end the course by considering issues of death and dying. This is good review and summary material.

The old debate about the definition of death<sup>51</sup> is useful for reprising themes of certainty versus flexibility and legislation versus common law development. In this context it is useful to remind students about the power of language: The nasty word for “certainty” is “rigidity;” the nasty word for “flexibility” is “uncertainty.” Almost every student I know favors flexible certainty. Unfortunately, there is no such thing.

Much more important than the definition of death is the question of expediting or facilitating death. Once again one can call the students’ attention to the dangerous potential of terminology to control outcomes. It is essential to teach them to avoid getting hung up on debates about what “euthanasia” really means and to eschew the quick fixes that terms like “ordinary” and “extraordinary” care seem to offer.

One can begin studying death facilitation by considering the pre-1976 state of affairs. All forms of death facilitation were felonies, yet no health care provider had ever been convicted of any crime growing out of death facilitating behavior despite its widespread practice. This gives the teacher a chance to reprise the lessons about the limits of the criminal sanction, to explore (or at least speculate about) the reasons for the split between the law as written and the law as applied, and to emphasize the importance of discretion in the legal system. One can raise the question of whether the written law-applied law gulf represented the abnegation of the rule of law or law operating at its sophisticated best.

Reformers and certainty seekers did not think that the pre-1976 situation was optimal. They pursued both judicial and legislative reform. Most of the development has been at the state level, although many state courts have attempted to resolve the issues as issues of federal constitutional law,<sup>52</sup> and the Supreme Court has been unable to

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<sup>51</sup> Compare, e.g., Roger B. Dworkin, *Death in Context*, 48 IND. L.J. 623, 638-39 (1973) (arguing that the law should not have a unitary definition for death, but rather, should describe the circumstances under which particular consequences flow), with Alexander Morgan Capron & Leon R. Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal*, 121 U. PA. L. REV. 87 (1972-1973) (proposing a model definition of death based on standards of respiratory and circulatory cessation and possibly on the reversible cessation of spontaneous brain functions).

<sup>52</sup> E.g., *In re Quinlan*, 355 A.2d 647, 660-64 (N.J. 1976) (contemplating federal constitutional issues such as the free exercise of religion, cruel and unusual punishment, and the right to privacy), *cert. denied sub nom. Garger v. N.J.*, 429 U.S. 922 (1976).

resist entering the fray.<sup>53</sup> The courts have been beset from the beginning by the fact that death, like sterilization, is a bad thing for those who are “getting” it and a good thing for those who are not. As with the *Valerie N.* sterilization case,<sup>54</sup> two competing values of alleged constitutional dimension are at stake, the right to live and an asserted right to die. In addition, the almost infinite factual variety of death facilitation cases, the impossibility of dealing soundly with them unless one understands the science surrounding each patient’s situation, the evolving nature of the science, widespread moral disagreement about some forms of death facilitation, and the desire to control conduct make it plain that constitutional adjudication cannot provide optimal solutions to the issues.

This is not the place for a major analysis of the death facilitation cases. However, the lack of fit between constitutional adjudication and death facilitation issues can be seen by looking briefly at some of the judicial developments to date.

First, all the early cases considered whether to allow life sustaining treatment to be withdrawn from mentally incompetent persons. Focusing on “rights” led the courts astray. If a right exists, they reasoned, it must belong to everybody.<sup>55</sup> It would be wrong to deny the right to incompetent persons because that would demean persons with handicaps.<sup>56</sup> Therefore, in cases involving incompetent persons the courts first decided what rights a competent person would have and then sought to provide the same rights to an incompetent person.<sup>57</sup>

This is both unworkable and offensive. It is unworkable because many American rights, including the right to reject medical care, are premised on an ability to make choices. Incompetent persons cannot make meaningful choices. Thus, they cannot have the same rights as competent persons. Pretending that they do requires courts to create a fiction and then to construct elaborate procedures and substantive standards to appear to apply the same right to competent and incom-

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<sup>53</sup> *E.g.*, *Vacco v. Quill*, 521 U.S. 793 (1997) (using an equal protection analysis to address assisted suicide statutes); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (using a due process analysis to address assisted suicide statutes); *see also* *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990) (ruling on a family’s right to remove artificial hydration and nutrition from a mentally incompetent person).

<sup>54</sup> 707 P.2d at 771.

<sup>55</sup> *See, e.g.*, *LIMITS*, *supra* note 21, at 117.

<sup>56</sup> *Cf.* David Randolph Smith, *Legal Recognition of Neocortical Death*, 71 CORNELL L. REV. 850, 861 n.49 (1986) (citing case law affirming the privacy rights of incompetent persons).

<sup>57</sup> *E.g.*, *Quinlan*, 355 A.2d at 663-64; *see also* *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 431 (Mass. 1977); *In re Spring*, 405 N.E.2d 115, 119 (Mass. 1980).

petent persons.<sup>58</sup> In fact, of course, the incompetent person, who is unable to choose, has someone else choose for him or her, and in the name of the incompetent person's rights, somebody else's choices are imposed upon him or her.

Sometimes this leads to truly ugly results. For example, in the tragic Massachusetts case, *Matter of Spring*, the court authorized an annoying, sick old man, who had never expressed any views about whether there were conditions in which he would prefer not to live, to be killed by his family members because he had a "right" not to have medical care forced upon him.<sup>59</sup>

In addition to leading to bad results, treating incompetent persons as if they were competent in the name of their dignity and their rights is offensive in another way. Far from respecting the dignity of persons with disabilities, this approach demeans disabled persons by requiring the law to ignore what is probably the most significant feature of the person's life and forcing the disabled person into a model of what a person "should" be like—*us*, the non-disabled. How that promotes the dignity of persons with disabilities I do not know.

A second illustration of the absence of fit between constitutional adjudication and death facilitation lies in the courts' efforts to distinguish withholding and withdrawing medical care from physician assisted suicide and euthanasia. By now the right to have even life sustaining medical care withheld or withdrawn in certain circumstances is widely recognized.<sup>60</sup> The Supreme Court has said that the existence of such a right could be inferred from its decisions,<sup>61</sup> and it has assumed for the sake of argument that the right includes a right to have artificial nutrition and hydration withdrawn under some circumstances.<sup>62</sup> Nonetheless, great reluctance still exists to permitting assisted suicide or euthanasia.

One state, Oregon, has legislatively authorized physician assisted suicide.<sup>63</sup> No state court has recognized a right to assisted suicide, and no state has authorized euthanasia. At the human level this is easy to understand. It feels like there is a difference between not

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<sup>58</sup> See, e.g., *Quinlan*, 355 A.2d at 664 (noting the "sad truth" of Quinlan's incompetence); *Saikewicz*, 370 N.E.2d at 431 (Mass. 1977) (reciting the history behind the substituted judgment doctrine).

<sup>59</sup> 405 N.E.2d at 122.

<sup>60</sup> See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 277 n.6 (1990), for a collection and summary of cases relating to withdrawal of life sustaining medical treatment.

<sup>61</sup> *Id.* at 278.

<sup>62</sup> *Id.* at 279.

<sup>63</sup> Death with Dignity Act, OR. REV. STAT. §§ 127.800-.897 (2001).

treating a person on the one hand and providing the person with the means of self destruction or even applying the means oneself on the other. Every doctor I have discussed this with over the last thirty years has felt this distinction deeply.

Yet at the level of principle the distinction is unsound, and principle is the only level at which the Constitution can meaningfully respond. The proffered distinctions are well known: commission versus omission, death caused by the underlying condition versus death caused by an external agent, a long tradition that supports rejecting unwanted medical care versus no such tradition supporting assisted suicide or euthanasia, the fear that euthanasia or assisted suicide will lead to abusive killings (as if withholding or withdrawing care will not). Whether any or all of these distinctions are persuasive, none of them rests on any principle. One could construct a principle that would justify recognizing a right to have medical care withheld or withdrawn, but that principle would equally include assisted suicide and euthanasia. The principle, of course, would be bodily autonomy – the right to have done with one’s body what one wants and the right to make significant decisions about one’s own body. This is also the only coherent principle that could underlie a right to abortion. However, this principle would also support assisted suicide and euthanasia. The Supreme Court knows that. That is why in the physician assisted suicide cases the Court specifically rejected the notion that autonomy is a constitutionally protected principle, rejected all principle, and based its distinction of the constitutional status of withholding and withdrawing care and assisted suicide on tradition.<sup>64</sup>

This substitution of tradition for principle makes a mockery of constitutional adjudication. Traditions are where one finds them. How traditional must a practice be for it to be constitutionally enshrined? The tradition opposing abortion was 150 years old and nationwide at the time of *Roe v. Wade*. Why was that not enough to deny a constitutional abortion right if a less firmly entrenched tradition was enough to deny such a right to assisted suicide? The point here is not to argue about whether *Roe* or the assisted suicide cases reached socially desirable results. The point is that both of them demeaned the Supreme Court by having it do what lesser courts could do and left us with no ability to use its decisions to reason our way to other decisions. If Supreme Court decisions stand for their results and nothing more, then the Supreme Court truly is susceptible to the criticism of its political enemies that all it does is to enshrine the prefer-

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<sup>64</sup> *Vacco v. Quill*, 521 U.S. at 799-809; *see also Washington*, 521 U.S. at 710-28.

ences of five of its members. If the existence or nonexistence of a constitutional right to withholding or withdrawing medical care, assisted suicide, or euthanasia cannot be resolved at the level of principle, then it ought not to be resolved by the Supreme Court.

The Supreme Court seems to have learned part of this lesson, perhaps from its thirty years of experience with *Roe v. Wade*. As already noted,<sup>65</sup> in its first “right to die” case the Court did not hold that any death related right exists; it merely said that such a right could be inferred from prior decisions, assumed that the right would include a right to reject artificial nutrition and hydration, and then held that Missouri had strong enough state interests to justify denying the right in the circumstances of that case.<sup>66</sup> Even in the assisted suicide cases, which I have criticized above, the Court went out of its way to emphasize that it was intentionally leaving the issue of physician assisted suicide open for public debate and state action – in other words, for non-constitutional law making.<sup>67</sup> This is a very good development.

Constitutional adjudication is an inappropriate means for resolving death facilitation issues because no constitutional text plausibly supports any relevant right; because no agreed upon principle is at stake; because competing values are too important to elevate one over the other; because sound decision making requires understanding of rapidly changing, scientific facts; and because the issues do not involve the nature and structure of the government.

Recognizing the inapplicability of constitutional adjudication does not, of course, make an affirmative case for any other kind of legal involvement. Every state now has some form of death facilitation legislation, which purports to give patients a large measure of control over the manner and timing of their deaths. These statutes typically authorize living wills,<sup>68</sup> the appointment of health care representatives,<sup>69</sup> and/or the creation of durable powers of attorney for health care.<sup>70</sup>

Yet, these statutes have proved largely unworkable in practice.<sup>71</sup> Some of their failures can be chalked up to bad drafting or an unwill-

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<sup>65</sup> See *supra* text accompanying nn. 62-63.

<sup>66</sup> *Cruzan*, 497 U.S. at 281.

<sup>67</sup> *Washington*, 521 U.S. at 735 (“Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”).

<sup>68</sup> E.g., IND. CODE ANN. §§ 16-36-4-1 to 16-36-4-21 (West 1997).

<sup>69</sup> E.g., IND. CODE ANN. §§ 16-36-1-1 to 16-36-1-14 (West 1997).

<sup>70</sup> E.g., IND. CODE ANN. §§ 30-5-4-1 to 30-5-10-4 (West 1994).

<sup>71</sup> See generally, LIMITS, *supra* note 21, at 126-31 (noting, for example, that some living will statutes require the person to be competent, to use a model form, and

ingness to put teeth into the statutes, but in large measure the failures are attributable to things no legislation can change. Statutes cannot overcome the fact that doctors are afraid of lawsuits and that surviving relatives, not dying or dead patients, sue. If relatives want a patient with an advanced directive to be kept alive, the relatives will prevail over the advanced directive. Statutes cannot overcome the fact that doctors see death as the enemy and the death of a patient as a personal failure. That attitude will lead to over-treatment, not to honoring patients' wishes to be allowed to die. Statutes cannot overcome the fact that human beings do not (and cannot) think in detail about all or even many of the situations that will confront them as they approach death so that advanced directives tend to speak in meaningless generalities. Statutes cannot overcome the fact that as a nation we are ambivalent about dying; we do not want the "wrong" people to die. That means we will consider cases, not documents, when we decide whether to withhold or withdraw care. Statutes cannot overcome the infinite variety of deaths and the fact that decisions must be made one at a time, not across the board. It is a lot easier to agree that, "There Oughta' be a Law," than to devise one that will work.

Constitutional adjudication and legislation cannot deal with death facilitation. Neither can the common law. While the occasional lawsuit for keeping someone alive too long or to collect a bill from a patient who asked to die can be envisioned, real recognition of patient control over the manner and timing of death requires conduct control – forcing doctors to act a certain way – and common law courts cannot give us that. Administrative agencies with their hopeless bureaucracies also seem clearly unsuited to the task.

This brings us once again to the question of devising new institutions. In the death facilitation area at least one new institution, the hospital ethics committee, already plays a central role, a role recognized and endorsed as early as the *Quinlan* decision in 1976.<sup>72</sup> Discussion of the utility and legitimacy of these committees as well as of the institutions the class thought of to deal with issues of gene therapy, cloning and stem cell research should be useful.

By the time that all of this has been discussed, the students should have a reasonably good knowledge of the legal system, its component parts, and the abilities and limits of the parts and the whole. They

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are only applicable when a patient has a terminal condition). Missouri Supreme Court Justice Welliver went so far as to call his state's living will statute a fraud on the people of Missouri. *Cruzan v. Harmon*, 760 S.W.2d 408, 442 (Mo. 1988) (Welliver, J. dissenting), *aff'd sub nom. Cruzan v. Dir.*, Mo. Dep't of Health, 479 U.S. 261 (1990).

<sup>72</sup> See 355 A.2d at 668-69 (citing Karen Teel, *The Physician's Dilemma: A Doctor's View: What the Law Should Be*, 27 BAYLOR L. REV. 6, 8-9 (1975)).

should be aware of the institutional constraints on substantive law reform and how best both to promote and to oppose specific types of reform. They also should have an idea about the need for institutional (procedural) reform and about the limited possibilities for achieving that. In other words, they should have a much more realistic understanding about law and the legal system than they would have without taking such a course. This should make them better lawyers than they would otherwise be and should equip those who go on to become judges, legislators, and administrators to do their jobs much better than most people who hold those jobs do.

In addition to all of this, the students will have had the opportunity to learn about and consider some of the most interesting issues of our age. And they will be able to have intelligent conversations about those issues. By focusing on the legal process, one can discuss the most controversial subjects in rational terms. One can assume a substantive position and see how good a job different legal institutions can do in achieving it.<sup>73</sup> Alternatively, one can evaluate an institutional response by asking what a neutral observer would think.<sup>74</sup> Neither approach is likely to lead to acrimony or the kind of discussion that causes people to stop thinking.

Eschewing bioethics and teaching legal process in the context of the law's response to rapid change in biology and medicine provides a useful and distinct role for legal academics while it prepares future lawyers and lawmakers for high quality professional performance and, thereby, should improve the law that governs us all.

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<sup>73</sup> For example, rather than argue about pro-choice and pro-life, the class can assume that everyone is pro-choice and still see *Roe v. Wade* as a disaster.

<sup>74</sup> For example, we have seen that a neutral observer would agree that the common law has dealt well with A.I.D. cases involving married women and consenting husbands because the results have been satisfactory from everybody's point of view. See, *LIMITS*, *supra* note 21, at 64.